IN THE SUPREME COURT
STATE OF MISSOURI

No. SC 84875

IN RE JOSEPH K. ROBBINS,

Respondent.

RESPONDENT'S BRIEF

Edward J. Rolwes #51522
Michael D. Quinlan #35314
Rosenblum, Goldenhersh,
Silverstein & Zafft, P.C.
7733 Forsyth Blvd., Suite 400
Clayton, MO 63105
(314) 726-6868

Martin M. Green #16465
Joe D. Jacobson #33715
Green Schaaf & Jacobson, P.C.
7733 Forsyth Blvd., Suite 700
Clayton, MO 63105
(314) 862-6800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STANDARD OF REVIEW

Professional misconduct must be proven by a preponderance of the evidence. *In re Snyder*, 35 S.W.3d 380, 382 (Mo. banc 2001); *In re Weier*, 994 S.W.2d 554, 556 (Mo. banc 1999). Charging a lawyer with professional misconduct does not create a presumption that professional misconduct occurred. *In re Mirabile*, 975 S.W.2d 936, 939, 942 (Mo. banc 1998).

A hearing panel's findings of fact, conclusions of law, and recommendations are advisory. *In re Oberhellmann*, 873 S.W.2d 851, 852-53 (Mo. banc 1994). The Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. Rule 5.16; *In re Snyder*, 35 S.W.3d at 382; *In re Weier*, 994 S.W.2d at 556.

STATEMENT OF FACTS

The statement of facts in Informant's brief is inadequate because it includes facts that are not supported by the Record, including the transcript of the August 2, 2002 hearing ("Hearing") before the Disciplinary Hearing Panel ("Hearing Panel"); fails to include facts from the Record that are supportive of Respondent, Joseph K. Robbins; and as it does not include a number of facts from the Record regarding Mr. Robbins' background.

In addition, Mr. Robbins has filed herewith a motion to open the Record to permit him to file his affidavit dated January 21, 2003, and certain letters attesting to his competence, character and diligence (hereinafter "*Robbins Affidavit*"). [1]

---

[1] Pursuant to Mr. Robbins' separately filed Motion To Open Record ("Motion"), Mr. Robbins has moved to supplement the Record with his affidavit which details facts in mitigation of any discipline to be imposed. This Court has previously recognized that "[I]n an attorney discipline case, this Court functions as the trial court that enters the judgment. A trial court has wide discretion to reopen a case for presentation of additional evidence and to allow rehearing." *In re Coe,* 903 S.W.2d 916, 918, *n*. 1 (Mo. banc 1995).

For these reasons, Mr. Robbins offers the following supplement to Informant's statement of facts.

BACKGROUND OF JOSEPH K. ROBBINS

Mr. Robbins is a native of St. Louis City. He was born in 1957. He graduated from the University of Missouri-St. Louis in 1982 and from St. Louis University School of Law in 1985. He worked as a house painter through college and most of law school to finance his education. In his final year of law school he worked as clerk for a law firm. T.88-89; *Robbins Affidavit* at ¶¶ 2-4.

Immediately upon admission to the Bar, Mr. Robbins was employed in a personal injury litigation practice, first at an insurance defense firm, Kortenhof & Ely, and then at a plaintiff's personal injury firm, Hoffman & Wallach. In 1991, Mr. Robbins established his own practice focused on plaintiff's personal injury. Mr. Robbins subsequently employed an associate and has since practiced as the sole proprietor of a two-lawyer law firm. *Robbins Affidavit* at ¶¶ 5-7.

Since forming his own firm, Mr. Robbins has represented over 2,100 clients. *Robbins Affidavit* at ¶ 8. He has approximately 200 active matters open at any given time. T.88, 116.

During his career Mr. Robbins has been involved in charitable and Bar activities and has also provided *pro bono* legal representation. *See* Part IV, *infra*. He is married and has two children, ages 14 and 11. Mr. Robbins provides his family's primary financial support. Mr. Robbins has an excellent reputation in the community and in the legal profession for honesty, competence and diligence. Several letters attesting to Mr. Robbins' character and reputation are attached to his affidavit filed herewith.

REPRESENTATION OF WALTER VIERMANN

Mr. Robbins represented Walter Viermann and his wife, Lola Viermann, on a number of matters over the years. One matter involved a possible wrongful death suit that Mr. Robbins agreed to investigate and possibly file for Mr. Viermann following Lola's death on May 15, 1995. Mr. Robbins did not decline the wrongful death claim or file the case within the limitations period. T.93, 107. At the Hearing, Mr. Robbins candidly acknowledged that he neglected the Viermann file. T.126.

Mr. Robbins supplements Informant's statement of facts regarding his representation of Mr. Viermann with the following:

1. There is no evidence that Mr. Robbins knowingly failed to advise Mr. Viermann in 1999 that the statute had run on the wrongful death claim. Mr. Robbins' Viermann file was not available at or prior to

the Hearing because Mr. Robbins returned it to Mr. Viermann and it was subsequently destroyed by Mr. Viermann through no fault of Mr. Viermann. T.51, 54. Consequently, at the Hearing, Mr. Robbins recalled very little about the Viermann case. T.93. Importantly, Mr. Robbins had no recollection of any present knowledge in June, 1999 that the statute of limitations had already run on the wrongful death action. T.92.

2. While Mr. Viermann testified that Mr. Robbins did not tell him in 1999 that the statute had run, there was *no evidence* to support an inference that Mr. Robbins *knew* he had missed the statute and *deliberately* failed to so inform Mr. Viermann in 1999, when he returned the file. Mr. Robbins' first became aware there was a statute problem on the case *after* he received Mr. Viermann's complaint letter to the Bar. T.105.

3. Informant's statement that Mr. Viermann "was *never allowed* to talk to Mr. Robbins when he called the office," misstates the Record. *See* Informant's Brief at pg. 5, citing T.22, 33, 46 *(emphasis added).* Mr. Viermann's testimony contradicts Informant's statement. He testified, in fact, that on at least one occasion, he did speak with Mr. Robbins. T.42-43. *Mr. Viermann also admitted that he did not ask to speak with Mr. Robbins, except for "a couple of times," and he never asked that Mr. Robbins return any of his calls.* T.46.

4. Informant's statement that "Mr. Viermann *was told* several times *over the years* that there was still time to file the wrongful death case" is potentially misleading for two reasons. *See* Informant's Brief at pg. 5, citing T.42 *(emphasis added).* It suggests that Mr. Robbins (rather than someone in his office) made these statements to Mr. Viermann even though there is no evidence of that in the Record. First and foremost, there is *no evidence* as to *when* any statements were made to Mr. Viermann to the effect that he still had time to sue. Specifically, there is *no evidence* supporting a reasonable inference that Mr. Robbins (or any of his staff) made such representations *after the statute had expired*. On the contrary, Mr. Viermann testified only that he was told by a "secretary or somebody" on three occasions that there was still time to pursue the case. However, Mr. Viermann ***could not recall when*** those conversations occurred and, specifically, he could ***not recall if they*** occurred in 1995 (well within the statute) or later on. T.42-43.

5. Mr. Viermann did recall "one time" that Mr. Robbins told him he still had time to sue, ***but he couldn't remember when that discussion took place***. T42-43. There is simply no evidence before this Court that Mr. Robbins (or anyone in his office) ever told Mr. Viermann that there was time to file the suit after the suit was time-barred.

6. Informant's statement that: "[Mr. Robbins] never advised Mr. Viermann that he had concluded that Mr. Viermann did not have a good wrongful death case" embellishes the Record. Informant seems, erroneously, to suggest the existence of evidence that Mr. Robbins had formed a conclusion yet failed to present it to his client. *See* Informant's Brief at pg. 5, citing T.45, 53. The Record shows only that Mr. Robbins did not have any independent recollection, *one way or the other*, at the time of the Hearing whether he told Mr. Viermann that he did not have a case. T.106. Mr. Robbins simply agreed, based on information at the Hearing, that it appeared he had not declined the case before the statute expired. T.40-41, 106, 112-113.

7. Informant's statement that "[Mr. Robbins] *never* discussed the statute of limitations with Mr. Viermann" misrepresents the Record. *See* Informant's Brief at pg. 5, citing T.21-22 *(emphasis added).* Informant cites to Transcript pages 21 and 22 to support this statement. However, on the contrary, nothing there shows Mr. Robbins "never" discussed the statute with Mr. Viermann that those pages reflect only that the statute was not discussed "at [the] first meeting." T.21-22.

8. There is no factual basis for any suggestion that Mr. Robbins failed to promptly refund Mr. Viermann's deposit. Informant's statement of facts ignores Mr. Viermann's testimony in response to specific

questions to make it "crystal clear" when he requested and received his file and his money. *Mr. Viermann testified that he received both his expense deposit refund and his file from Mr. Robbins in July 1999, "when" his workers' compensation case was settled.* T.54-55, 34-35, 40-41.

9. Mr. Viermann has not made a claim against Mr. Robbins. T.124. Mr. Robbins maintains malpractice insurance coverage with The Bar Plan. T.124. Mr. Robbins' malpractice insurance is sufficient to cover any damages that Mr. Viermann may have incurred. *Robbins Affidavit* at ¶ 10.

REPRESENTATION OF BETTY McFADDEN

Mr. Robbins represented Betty McFadden in her claims against Walgreen's and its pharmacist arising out of an improperly filled prescription. Mr. Robbins has acknowledged his mistakes with respect to the McFadden matter, including his failure to file Ms. McFadden's claim within the statute of limitations, T.96, but Mr. Robbins denies that he knowingly misled Ms. McFadden at any time about the status of her case.

Mr. Robbins supplements Informant's statement of facts regarding his representation of Ms. McFadden with the following:

1. Ms. McFadden testified she called Mr. Robbins every month or so to check on her case between June 1994 and January 1997. T.68.

There is no testimony in the Record that there were regular calls to Mr. Robbins' office *after* January 1997. T.68-69, T.82. Informant's general statement that Ms. McFadden called every month or so incorrectly suggests there is evidence these regular calls continued after January, 1997. *See* Informant's Brief at pg. 7.

2. Ms. McFadden testified that she asked Mr. Robbins in 2001 if there had been any settlement discussions with Walgreen's. T.72. Informant's statement of facts fails to recognize Ms. McFadden's admission that she did not speak with Mr. Robbins about whether or not her lawsuit was pending when they spoke in 2001. T.82-83. *See also* T.97-98, 72-74. Ms. McFadden admitted that she did *not* ask about the status of her case during Mr. Robbins' conversations with her. T.83, 100-101. She inquired about settlement. T.72-73, 100-101.

3. Informant's statement also fails to recognize there is no evidence suggesting Mr. Robbins *actually knew* the McFadden case was dismissed when Ms. McFadden called in 2001 to ask about settlement offers. Ms. McFadden testified that when she asked about a settlement offer from Walgreen's Mr. Robbins told her: "Well, I'm going to get back with you." T.73.

4. Since beginning his own practice, in 1991, Mr. Robbins has represented over 2,100 clients. *Robbins Affidavit* at ¶ 8. Mr. Robbins

represents hundreds of clients at any one time. T.88, 116. Mr. Robbins acknowledges he did not but should have looked at the file before speaking with Ms. McFadden about her case. T.121. Mr. Robbins either confused the McFadden file with a similar file in his office when he spoke with Ms. McFadden about possible settlement, or he mistakenly assumed the case was pending or had been refiled. T.97-98, 100-101. There is no evidence that Mr. Robbins ***knowingly or intentionally*** failed to tell Ms. McFadden that her claim was time-barred.

5. If Mr. Robbins had been aware that Ms. McFadden's case was time-barred when he spoke with her he would have called his insurance carrier, The Bar Plan, and asked for instructions on the proper way to handle the situation. T.108. After speaking with his carrier, Mr. Robbins would have followed its instructions and advised the client that the statute had run on the case before it was filed. T.109.

6. Ms. McFadden did not make any efforts to communicate with Mr. Robbins after February 2001, and she did not call Mr. Robbins' office after that time. T.81.

7. Informant's statement that Ms. McFadden "was *never* successful in getting to talk to Mr. Robbins, although he did sometimes return her calls" misstates the Record. *See* Informant's Brief at pg. 7, citing T. 69-70 *(emphasis added).* The Hearing transcript shows Ms.

McFadden was asked if she was successful "*each* time" she tried to contact Mr. Robbins, (T.69) *(emphasis added*), and she answered: "[n]o, *several* times he was out of his office, and I left messages with his secretary." T.69 *(emphasis added).* Ms. McFadden also acknowledged that Mr. Robbins "sometimes" got back to her and that she spoke with Mr. Robbins about her case. T.69-70. ***Ms. McFadden did not testify that she "was never successful" in getting to talk with Mr. Robbins, as Informant claims.***

8. Mr. Robbins did not at any time ever knowingly misrepresent the status of her case to Ms. McFadden. T.115.

9. Ms. McFadden has not made a claim against Mr. Robbins. T.124. Mr. Robbins' malpractice insurance is sufficient to cover any damages that Ms. McFadden may have incurred. *Robbins Affidavit* at ¶ 10.

DISCIPLINE CASE

Informant's statement of facts regarding Mr. Robbins' not answering a letter to him from Mr. Pratzel, the committee's special representative, about Ms. McFadden's complaint is incomplete. Informant fails to point out that Mr. Robbins ***did*** answer other letters he actually received from Mr. Pratzel, including correspondence regarding Mr. Viermann's complaints. T.103-104. It is undisputed that Mr.

Robbins did respond to several other letters sent by Mr. Pratzel. T.104. As Informant's statement acknowledges, Mr. Robbins has no recollection of having received this one letter from Mr. Pratzel regarding Ms. McFadden's complaints. *See* Informant's Brief at pg. 10; s*ee also,* T.104, 120. Informant can point to no evidence that Mr. Robbins actually received the letter at issue, or, more importantly, that he deliberately or in bad faith failed to respond.

MR. ROBBINS' IMPROVED OFFICE PROCEDURES

The following statement of facts is offered regarding Mr. Robbins' improved office procedures, as Informant's statement is incomplete.

1. Mr. Robbins has taken steps to improve his office procedures. T.99-100. These steps include a regular file audit procedure, added safeguards to avoid missing any deadlines on his files, and a file-review procedure when he speaks with clients regarding the status of their files.

2. Mr. Robbins has implemented a regular file audit procedure. Mr. Robbins now makes sure that every file in his office is reviewed on a regular basis. Mr. Robbins does a "global check" of files every thirty to sixty days. T.114, 119-120. During these file reviews, Mr. Robbins goes through every file "from A to Z" to determine exactly what is going on with it and if the file is progressing. T.114. The procedure helps make sure every file gets "touched and acknowledged" to make sure things are

not "slipping through any cracks." T.114. Mr. Robbins has been able to consistently follow his thirty to sixty day comprehensive file audit procedure. T.115. He finds time to do this during "quiet time," usually on Saturday mornings. T.115, 134. He has a reminder on his monthly Daytimer system to "check files." T.134.

3. Mr. Robbins has also implemented new safeguards to avoid missing any deadlines on his cases. Now, when Mr. Robbins calendars a filing date, he builds in a "buffer zone" of six months to one year. This causes the date to come up on his diary as a statute-date before the statute of limitations is an issue. T.101-102. Mr. Robbins also prints out a list of the "premature dates" or the "buffer dates" every thirty days. T.137. At that time he then gets the case filed if it hasn't been filed. T.102. In effect, by predating the deadline by six months to one year he avoids running up against the due date. T.102.

4. Mr. Robbins is confident that his current practices and procedures -- calendaring of statutes with built-in "buffer zones" and the regular periodic file audit procedure -- is adequate to monitor the status of pending cases to avoid having a statute issue in the future. T.138. Mr. Robbins has not had any other instances where he has failed to file a case on time since adopting these new procedures. T.103, 139.

5. Mr. Robbins' practice and procedure has also changed as to how he communicates with clients concerning the status of cases. T.99. Since handling the Viermann and McFadden matters Mr. Robbins has implemented steps to prevent any inadvertent miscommunications with his clients. T.99. Mr. Robbins now reviews the client file before discussing the status of a case with a client, unless he has a specific recollection from having worked on the file very recently. T.99-100. Mr. Robbins' communication with clients has been "very good" since he adopted this new procedure. T.99-100.

FACTS RELATED TO MITIGATION

Mr. Robbins has practiced law in St. Louis for 17 years. Other lawyers and the judges before whom he has appeared hold him in high regard both as to his ethics and competence, as evidenced by the several letters filed with the Court as attachments to Mr. Robbins' affidavit. *Robbins Affidavit* at ¶ 11. The individuals who wrote these letters are:

a. *Eugene K. Buckley*. Mr. Buckley, formerly of the Evans & Dixon law firm and now of counsel to the law firm of Noce & Buckley, LLC, has been for many years one of the preeminent trial lawyers in St. Louis. Mr. Buckley states:

> I always found Joe Robbins to [be] an ethical lawyer of high moral character. He was always

> civil and professional in his dealings with me. I considered him to be an able lawyer, who represented his clients well.

b. *The Hon. Mary K. Hoff.* Prior to her service on the Missouri Court of Appeals, Eastern District, Judge Hoff served as a Circuit Judge in the City of St. Louis. Judge Hoff knows Mr. Robbins both as a lawyer who has appeared before her in court as well as a neighbor and friend. Judge Hoff states, in part:

> My experience with Joe while I was a circuit court judge in the city was good. I found him to be cooperative, timely, and attentive to his cases. I have never heard a complaint about Joe as a lawyer.

c. *The Hon. John J. Riley.* Judge Riley serves a Circuit Judge in the City of St. Louis. Mr. Robbins has appeared before Judge Riley; Judge Riley is also a neighbor of Mr. Robbins. Judge Riley states in part:

> In connection with his civil trial practice, Joe has appeared before me on several occasions and tried one case to completion. He consistently conducts himself in a highly professional manner. In his trial practice, Joe is timely, courteous, thorough,

> and to the point. I would welcome him in this courtroom any time. He is highly regarded in the legal community.
>
> In his personal life, Joe Robbins is a good neighbor, concerned citizen, and dedicated family man. Professionally, he is a well-respected attorney who enjoys a solid reputation for hard work, integrity, and honesty.

d. *The Rev. Kenneth A. Brown.* Rev. Brown is the pastor of St. Margaret of Scotland Church, the church that Mr. Robbins attends. In addition to writing about Mr. Robbins' participation in the parish and community, Rev. Brown also describes *pro bono* legal services provided by Mr. Robbins to the parish:

> Mr. Robbins has also been generous in sharing his legal expertise with the parish. Several years ago when we had run into some difficulty in securing services for which we had contracted, Mr. Robbins took up the case for us. And this was fairly lengthy work for which he received no remuneration. As a city parish with its own

financial problems, the pro-bono work which Mr. Robbins provided proved to be of great service.

e. *Mr. Dan Kappel.* Mr. Kappel is the district vice president for the YMCA of Greater St. Louis. In his letter, Mr. Kappel lists the positions Mr. Robbins has held with the South City Family YMCA and the various contributions he has made to the organization over the years.

Mr. Robbins has long been involved in charitable and community activities. *Robbins Affidavit* at ¶ 9(a).

He has been a member of his neighborhood association, the Flora Place Association, since 1988 and has served as an officer of the association. *Id.*

He is a member of the Law Library Association of St. Louis and has served as a member of the board of directors since 1990. The Law Library Association is the organization charged with the maintenance and organization of the library located at the Circuit Court of the City of St. Louis. *Id.*

He has been a member of the board of managers of the South City–Carondelet YMCA since at least 1997, and has been actively involved in its fundraising activities for many years. *Id.*

He is active in St. Margaret of Scotland parish and its school. He serves on the school's curriculum committee and as a boys' baseball coach. *Id.*; T.89-90.

Mr. Robbins has also been active in Bar activities for many years. *Robbins Affidavit* at ¶ 9(c). He has been active on both the civil practice and procedure committee and the continuing legal education committee of the Missouri Bar, as well as on the medical-legal committee of the Bar Association of Metropolitan St. Louis ("BAMSL"). He has been an active member of BAMSL's trial section since 1989, and of BAMSL's fee dispute committee since 1992. As a member of the fee dispute committee, he investigates fee dispute claims, submitting a report of his investigation to the committee as a whole, and, in other matters, has provided legal assistance without charge to individuals involved in fee disputes with their attorneys. Mr. Robbins has written four articles for the BAMSL publication, T*he St. Louis Bar Journal*: "Depositions at Trial," "Out of State Depositions," "Use of Pleadings and Abandoned Pleadings at Trial," and "Choosing Presentation of Medical Evidence." Mr. Robbins has served as either a moderator or speaker at six seminars on various legal topics. *Id.*; T.89.

Mr. Robbins has been fully cooperative with the Bar in its investigation of the charges made against him. Although the panel

recommended that Mr. Robbins be disciplined for not responding to a single letter addressed to him by the regional disciplinary committee, the evidence establishes that Mr. Robbins was, in fact, fully cooperative and responsive. Indeed, Mr. Pratzel, the special representative for the committee, in cross-examining Mr. Robbins concerning that letter stated:

> The letter from me that you say you didn't get, and I acknowledge that you did respond to the other complaint, so that's kind of why I think I was surprised when I didn't hear from you on this...

T.110. Mr. Robbins also responded to the letters from the committee relating to the complaints that were ultimately dismissed at the hearing. T.103-04.

Furthermore, as evidenced by the record as a whole, Mr. Robbins forthrightly admitted his neglect in the two complaints at issue here. *See, e.g.*, T.121-22.

While Mr. Robbins' conduct in the two cases at issue exhibit neglect, it does not reflect adversely on his honesty. He has demonstrated remorse for his failings and has, on his own, taken the initiative to prevent such lapses from occurring again. His remedial actions were discussed in detail in his testimony before the Hearing Panel and in his affidavit, and include the following:

1) He has modified his method of recording the statute of limitations applicable to the claims he is handling. He has always calendared the statute of limitations when he brings in a case. Now, however, he enters as the statute of limitations a date six months to a year prior to the actual limitations date, and then treats the earlier date as though it were the actual limitations date. T.101-03; *Robbins Affidavit* at ¶ 13(a). This causes him to file suit on unresolved claims well before the actual limitations date. *Id.*

2) He has modified his method of reviewing his files. Previously he only reviewed files when there was activity on a claim. Now, he physically picks up and reviews each file in his office, from A to Z, on a regular basis, typically on the first Saturday of the month. T.114-15; *Robbins Affidavit* at ¶ 13(b). This ensures that no files fall between the cracks and that every file is kept active. *Id.*

3) He has modified his method of communicating with clients on the telephone. Previously, if a client called, he would talk to her about her case, "shooting from the hip" and relying on his memory even if he had not reviewed the file recently. Now, if a client calls and he has not worked on the matter recently, he reviews the file and then calls back to discuss the case. T.98-101, 115-16; *Robbins Affidavit* at ¶ 13(c). Mr. Robbins believes that this new

procedure helps prevent him from carelessly making an inaccurate statement to a client about her case. *Id.*

Mr. Robbins is the primary financial support for his family, consisting of himself, his wife, and two children, a girl age 14 and a boy age 11. T.90; *Robbins Affidavit* at ¶ 2.

POINTS RELIED ON

I. THE SUPREME COURT SHOULD NOT SUSPEND RESPONDENT JOSEPH K. ROBBINS FOR HIS NEGLECT IN HANDLING THE VIERMANN AND MCFADDEN MATTERS BECAUSE THE HEARING PANEL'S RECOMMENDATION OF A ONE MONTH SUSPENSION WAS BASED ON FINDINGS WHICH LACK ANY FACTUAL SUPPORT IN THE RECORD, INCLUDING FINDINGS OF INTENTIONAL OR KNOWING MISCONDUCT.

In re Snyder, 35 S.W.3d 380 (Mo. banc 2001)

In re Smith, 749 S.W.2d 408, 413 (Mo. banc 1988)

In re Weier, 994 S.W.2d 554 (Mo. banc 1999)

In re McBride, 938 S.W.2d 905 (Mo. banc 1997)

II. THE SUPREME COURT SHOULD DETERMINE THAT JOSEPH K. ROBBINS DID NOT VIOLATE RULE 4-8.1 BECAUSE THE HEARING PANEL'S RECOMMENDATION THAT A VIOLATION BE FOUND WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In re Weier, 994 S.W.2d 554, 556 (Mo. banc 1999).

In re Mirabile, 975 S.W.2d 936, 939, 942 (Mo. banc 1998)

In re Oberhellmann, 873 S.W.2d 851, 852-53 (Mo. banc 1994).

In re Snyder, 35 S.W.3d at 382

III. THE SUPREME COURT SHOULD IMPOSE DISCIPLINE OF A PUBLIC REPRIMAND, AND NOT A SUSPENSION, BASED ON THE PRIOR RULINGS OF THIS COURT AND THE ABA STANDARDS.

In re Staab, 719 S.W.2d 780 (Mo. banc 1986)

In re Weier, 994 S.W.2d 554 (Mo. banc 1999)

In re Hardge, 713 S.W.2d 503 (Mo. banc 1986)

In re Kramer, No. SC82516 (October 3, 2000)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

IV. THE SUPREME COURT SHOULD IMPOSE DISCIPLINE OF A PUBLIC REPRIMAND, AND NOT A SUSPENSION, BECAUSE OF THE EXISTENCE OF NUMEROUS MITIGATING FACTORS, INCLUDING MR. ROBBINS' ACCEPTANCE OF RESPONSIBILITY, HIS AFFIRMATIVE ACTIONS TAKEN TO AVOID A REOCCURRENCE, AND HIS GOOD REPUTATION FOR HONESTY AND COMPETENCE.

In re Harris, 890 S.W.2d 299 (Mo. banc 1994)

In re Weier, 994 S.W.2d 554 (Mo. banc 1999)

In re McBride, 938 S.W.2d 905 (Mo. banc 1997)

In re Carey, 89 S.W.3d 477 (Mo. banc 2002)

V. THE SUPREME COURT SHOULD SUSPEND ANY DISCIPLINE OF SUSPENSION AND PLACE MR. ROBBINS ON PROBATION PURSUANT TO RULE 5.225 BECAUSE MR. ROBBINS IS NOT A DANGER TO THE PUBLIC, CAN CONTINUE TO PRACTICE LAW WITHOUT PLACING THE COURTS IN DISRESPECT, AND HAS NOT COMMITTED AN OFFENSE WARRANTING DISBARMENT.

Mo. S. Ct. Rule 5.225

ARGUMENT

I. THE SUPREME COURT NOT SUSPEND RESPONDENT JOSEPH K. ROBBINS FOR HIS NEGLECT IN HANDLING THE VIERMANN AND MCFADDEN MATTERS BECAUSE THE HEARING PANEL'S RECOMMENDATION OF A ONE MONTH SUSPENSION WAS BASED ON FINDINGS WHICH LACK ANY FACTUAL SUPPORT IN THE RECORD, INCLUDING FINDINGS OF INTENTIONAL OR KNOWING MISCONDUCT.

The fundamental purpose of an attorney disciplinary proceeding is to protect the public and maintain the integrity of the legal profession. *In re Snyder*, 35 S.W.3d 380, 384 (Mo. banc 2001). Where an attorney has merely been negligent, a reprimand is the most appropriate sanction. *In re Weier*, 994 S.W.2d 554, 558-59 (Mo. banc 1999). This is a general standard and applies absent aggravating and mitigating circumstances. *In re McBride* 938 S.W.2d 905, 909 (Mo. banc 1997).

Mr. Robbins' neglect of the McFadden and Viermann matters is admitted and it is not in issue. At the Hearing, Mr. Robbins acknowledged that he failed to properly handle both clients' cases. Mr. Robbins admitted his responsibility and he has shown remorse for his conduct.

With regard to the Viermann matter, Mr. Robbins acknowledges that he neglected Mr. Viermann's wrongful death case and that he did not act diligently in handling the case or regularly communication with Mr. Viermann about the file, in violation of Rule 4-1.3 and 4-1.4.

With regard to the McFadden matter, Mr. Robbins acknowledges that he failed to act competently and diligently in the handling of that case and failed to keep Ms. McFadden reasonably informed about the status of her case in violation of Rule 4-1.1, Rule 4-1.3 and Rule 4-1.4.2.

However, Mr. Robbins takes issue with the Hearing Panel finding that he violated Rule 4-8.4, Rule 4-1.16(d) or Rule 4-8.1(b). The Hearing Panel's findings that these rules were violated and its recommendation of minimum one-month suspensions was based on findings that are not supported by the Record. Specifically, the following Hearing Panel findings were not proven by a preponderance of the evidence:

- that Mr. Robbins failed to comply with Mr. Viermann's request for information or return his telephone calls;

---

2 As discussed in more detail in Section IV, *infra*, Mr. Robbins has changed his office procedures to improve how he keeps track of due-dates and how he communicates with his clients. Informant does not suggest otherwise in its Brief.

- that Mr. Robbins failed to promptly return Mr. Viermann's file to him in violation of Rule 4-1.16(d);
- that Mr. Robbins failed to promptly return any unearned fees to Mr. Viermann;
- that Mr. Robbins "repeatedly failed" to comply with Ms. McFadden's request for information;
- that Mr. Robbins engaged in conduct that involves "dishonesty, fraud, deceit [and] misrepresentation" in violation of Rule 4-8;" and
- that Mr. Robbins engaged in conduct that is prejudicial to the administration of justice.

A closer examination of the Record shows that this Court should reject the above Hearing Panel findings.

A. The Hearing Panel's Finding That Mr. Robbins Repeatedly Failed To Comply With Mr. Viermann's Request For Information And Failed To Return Mr. Viermann's Telephone Calls Has Not Been Shown By A Preponderance Of The Evidence; There Is No Evidence To Support This Finding.

The Hearing Panel's recommended discipline was based in part on its conclusion that Mr. Robbins "repeatedly failed to comply with Mr. Viermann's request for information or otherwise return his telephone calls" Hearing Panel Decision at ¶ 3. The Record does not support this conclusion. Nowhere in the Record is there any testimony by Mr. Viermann that he asked Mr. Robbins for any information that he did not receive. Informant's Brief fails to identify any facts to support this conclusion.

Also, there is no basis in the Record to conclude Mr. Robbins failed to return Mr. Viermann's telephone calls. *See* Hearing Panel Decision at ¶ 3. This finding is particularly troubling *since Mr. Viermann admitted during his testimony that he never asked Mr. Robbins to return any of his telephone calls.* T.46. On what basis could the Hearing Panel conclude that Mr. Robbins failed to return Mr. Viermann's telephone calls when

Mr. Viermann admitted he never left a message for Mr. Robbins to do so? There is no basis in the Record to support this Hearing Panel finding.

B. The Hearing Panel's Finding That Mr. Robbins Failed To Promptly Return Mr. Viermann's File To Him In Violation Of Rule 4-1.16(d) Has Not Been Shown By A Preponderance Of The Evidence.

The Hearing Panel also concluded that Mr. Robbins failed to promptly return Mr. Viermann's file to him in violation of Rule 4-1.16(d). *See* Hearing Panel Decision at ¶ 3. Mr. Robbins acknowledges that a lawyer who has withdrawn or been discharged by a client has a duty to surrender promptly all papers and other property to which the client is entitled. *See* Rule 4-1.16(d). But the Informant did not prove a Rule 4-1.16 violation here. There is simply no evidence in the Record to support this conclusion.

Mr. Viermann ***did not testify*** that Mr. Robbins delayed in returning his files. On the contrary, Mr. Viermann shows there was ***no delay***; he admitted he received his file in July 1999 *when* he settled the workers' compensation case. T.34-35, 54-55.

It appears that the Hearing Panel based its finding that Mr. Robbins delayed in giving Mr. Viermann his file simply on the allegations of the Information, rather than on any evidence at the Hearing. *See*

Count I of Information at ¶ 10. The Hearing Panel's conclusion that Mr. Robbins failed to promptly return the file to Mr. Viermann is not supported by evidence introduced at the Hearing. Informant had the burden of proving this charge by "a preponderance of the evidence." It did not do so. This Court should reject the Hearing Panel's finding that Mr. Robbins delayed in returning Mr. Viermann's file to him.

C. The Hearing Panel's Finding That Mr. Robbins Failed To Promptly Return Any Unearned Fees To Mr. Viermann Has Not Been Shown By A Preponderance Of The Evidence; There Is No Evidence To Support This Finding.

The Hearing Panel also concluded that Mr. Robbins failed to promptly return unearned fees to Mr. Viermann. *See* Hearing Panel Decision at ¶ 3. Again, the Record does not support this finding.

There is no evidence whatsoever that Mr. Robbins ever received ***any fees*** from Mr. Viermann in connection with the wrongful death case. Rather, the testimony was only that Mr. Robbins, ***with Mr. Viermann's consent***, withheld $1,000 from the settlement of an earlier personal injury case ***to pay for anticipated expenses*** to investigate the potential wrongful death case. This money was not set aside as a retainer fee; it was set aside as an expense advance. T.20-21. Informant's own statement of facts admits this. *See* Informant's Brief at pg. 4-5.

Nowhere does Informant claim that Mr. Robbins received ***any fees*** from Mr. Viermann ***at any time*** that were withheld for any period from Mr. Viermann.

Nor is there any evidence of a delay in returning the expense deposit. Mr. Viermann testified that he received a refund of his expense deposit at the same time he received his file back. As with his file documents, *Mr. Viermann testified he received his money in July 1999 when he received his file.* T.34-35, 54-55. Mr. Viermann did not testify that Mr. Robbins delayed in returning his expense deposit. Also, there are no other facts in the Record that even suggest there was any delay.

Again, it appears that the Hearing Panel simply lifted this allegation from the Information without regard to the evidence at the hearing. *See* Information at ¶ 10.

D. The Record Does Not Support The Hearing Panel's Finding That Mr. Robbins "Repeatedly Failed To Comply With [Ms. McFadden's] Request For Information."

Mr. Robbins acknowledges that he did not properly handle Ms. McFadden's claim. But Mr. Robbins disputes that there are any facts in the Record to show that Mr. Robbins "repeatedly failed to comply with [Ms. McFadden's] request for information." *See* Hearing Panel Decision at ¶ 14.

Ms. McFadden testified she called Mr. Robbins every month or so to check on her case between June 1994 and January 1997. T.68. There is no testimony in the Record that Mr. Robbins did not respond to these inquiries. Also, there is no testimony in the Record that there were regular calls to Mr. Robbins' office *after* January 1997. T.68-69, T.82.

Also, although Ms. McFadden testified to conversations she had with Mr. Robbins in January and February of 2001, T.72-76, Ms. McFadden admitted she did not make any efforts to communicate with Mr. Robbins after February 2001 and she did not call Mr. Robbins' office after that time. T.81. The evidence does not support the conclusion that Mr. Robbins failed to comply with any requests for information from Ms. McFadden. The Hearing Panel's conclusion is not supported by the Record.

E. The Informant Did Not Meet Its Burden To Prove Mr. Robbins "Engaged In Conduct That Involves Dishonesty, Fraud, Deceit, [And] Misrepresentation" In Violation Of Rule 4-8.4.

The Hearing Panel concluded that Mr. Robbins has engaged in conduct that involves dishonesty, fraud, deceit, misrepresentation, and that is prejudicial to the administration of justice in violation of Rule 4-

8.4. Hearing Panel Decision at ¶ 17. This single, one sentence, finding stands alone, and is completely unexplained.

The Hearing Panel did not specifically state which section of Rule 4-8.4 Respondent violated. To the extent the Hearing Panel determined that Mr. Robbins violated Rule 4-8.4(c), that finding is not supported by the Record.

The Hearing Panel does not identify any evidence in the Record to support its finding that Mr. Robbins violated Rule 4-8.4(c), or state whether the alleged violation related to the McFadden or Viermann matters. *Id.*

The Informant did not prove, by a preponderance of the evidence, that Mr. Robbins violated Rule 4-8.4(c) with respect to the Viermann matter.

Mr. Robbins admits that he did not either decline Mr. Viermann's wrongful death claim or file the case within the applicable three-year statute of limitations. T.93, 107. That is not in issue. What is in issue is whether he realized his mistake and dishonestly, fraudulently and deceitfully misrepresented that information to his client.

A finding of deceit in violation of Rule 4-8.4(c) requires more than neglect, and an attorney will not be held to have deceived a client without

a showing of actual knowledge of the falsity of his statements. *See In re Smith* 749 S.W.2d 408, 413 (Mo. banc 1988).

In neither the Viermann nor the McFadden matter has the Informant provided evidence (much less proven) that Mr. Robbins represented to the client the continued viability of his/her claim while then and there possessing actual knowledge that such claim was already barred. In fact, Informant does not even claim an affirmative misrepresentation – fraudulent or otherwise. Rather, Informant bases it charges in both cases on the assertion that Mr. Robbins omitted disclosure of the correct status of the case. But, Informant does not and cannot establish on this Record that Mr. Robbins actually knew of something he had a duty to disclose.

Mr. Viermann's Case. In Mr. Viermann's case, there is evidence of only one conversation between Mr. Robbins and Mr. Viermann when the statute of limitations was arguably touched upon. But, Mr. Viermann could not recall when that conversation occurred.

Ms. McFadden's Case. Similarly in Ms. McFadden's case the Record shows only that Mr. Robbins incorrectly gave the impression Ms. McFadden's case was still viable when she called about settlement after the statute had run. But, there is no evidence that, ***at that time***, Mr. Robbins had actual knowledge that Ms. McFadden's case was time

barred. Nor is there evidence that he intended, deliberately, to deceive her. On the contrary, as Informant acknowledges, the only evidence on this question was Mr. Robbins' testimony that he (negligently) undertook to discuss Ms. McFadden's case with her without first consulting her file. While Mr. Robbins may be deemed to have had constructive knowledge of information contrary to the indications of his conversation, this will not support a finding of deceit under Rule 4-8.4(c). *Smith, supra*.

A detailed discussion of each case follows.

Mr. Viermann testified he was not told by Mr. Robbins in 1999 that the statute had run, but he wasn't referring to any one conversation during his testimony nor did he testify that he spoke with Mr. Robbins about the statute after the case would have been time-barred. The Hearing Panel did conclude in Paragraph 3 of its decision that Mr. Robbins "failed to inform Mr. Viermann that either he was not going to or in fact had not filed the lawsuit..." (Hearing Panel Decision at ¶ 3). However, there are no findings in the Hearing Panel Decision that Mr. Robbins ***knowingly and intentionally*** withheld information from his client, nor was there any evidence of this at the Hearing.

Mr. Robbins candidly acknowledged that he did not follow up on the Viermann file because of neglect. T.126. He believed that the file "was tucked in with other files" and "just got missed." T.126. Also, Mr.

Robbins' recalled he first became aware there was a statute problem on the case after he received Mr. Viermann's complaint letter to the Bar. T.105. There is no evidence that Mr. Robbins knew he had missed the statute earlier on. The Informant did not prove this any Rule 4-8.4(c) violation with respect to the Viermann matter.

Nor does the Record support a finding of a Rule 4-8.4(c) violation with respect to Ms. McFadden's case. The Hearing Panel's findings regarding Mr. Robbins' discussion with Ms. McFadden include findings of fact that are not supported by the Record and do ***not include*** any finding that Mr. Robbins ***knowingly or intentionally*** failed to inform Ms. McFadden her claim was dismissed and time-barred.

Ms. McFadden did testify that she had regular discussions with Mr. Robbins between 1994 and January, 1997 (before the motion to dismiss was filed) but the Hearing Panel apparently concluded (without any basis at all) that these regular discussions took place later on after Ms. McFadden's case was dismissed in 1997, between 1997 and 2001. This mistake would seem pivotal to the Hearing Panel's (apparent but unstated) conclusion that Mr. Robbins intentionally failed to inform Ms. McFadden that her claim was filed late.

Specifically, Paragraph 11 of the Hearing Panel's findings include the erroneous statement that: "[*b]etween 1997 and 2001* Mr. Robbins

would occasionally respond to repeated requests for information from Ms. McFadden about the status of her lawsuit and at no time did Mr. Robbins tell Ms. McFadden that he had, in fact, dismissed her lawsuit." Hearing Panel Decision at ¶ 11, *(emphasis added).* The Record does not support this statement.

Ms. McFadden testified that she did call Mr. Robbins on a regular basis over a two and one-half year period after she hired him. T.68-69. But these calls took place *up to January, 1997*, T.68-69, *before* the motion to dismiss was filed in March, 1997. T.121. Ms. McFadden did not testify that there were regular phone calls or "repeated requests for information" that Mr. Robbins answered "between 1997 and 2001" after her lawsuit was dismissed, her testimony referred to an earlier time-frame. The finding that Mr. Robbins responded to repeated request for information after her suit was dismissed in 1997 is completely unsupported by the Record.

In fact, Informant's own statement of facts about the communications between Ms. McFadden and Mr. Robbins makes no reference to any purported calls between January, 1997 and November, 2000. *See* Informant's Brief at pg. 8, citing T.70. This is consistent with Ms. McFadden's testimony at the Hearing. T.70. The evidence introduced at the Hearing stops far short of even remotely suggesting Mr.

Robbins responded to repeated request for information from Ms. McFadden between 1997 and 2001 after her suit had been dismissed.

Although Mr. Robbins did not tell Ms. Ms. McFadden her claim was time-barred when she called in 2001 to ask if there had been any settlement offers, there is no evidence suggesting Mr. Robbins *actually knew* that the McFadden case was dismissed at that time or that he *intended* to mislead Ms. McFadden. Ms. McFadden testified that she asked if there had been any settlement offers from Walgreen's when she called in 2001. T.72. Mr. Robbins recalled Ms. McFadden called about settlement but he couldn't place a time-frame on when that occurred. T.108. Given Ms. McFadden's testimony, Mr. Robbins acknowledges this conversation likely occurred in 2001.

Aside from *when* the conversation took place, it is apparent that *what* Mr. Robbins told Ms. McFadden stemmed from his lack of familiarity with the file ***rather than any intent to deceive*** his client. Ms. Robbins testified that Mr. Robbins told her when she called in January 2001 that he would have to "get back with [her]". T.73. Mr. Robbins testified that when he spoke with Ms. McFadden about her case he confused the case with another file in his office. T.98. There was no evidence that Mr. Robbins' failure to tell Ms. McFadden that her claim was time-barred stemmed from an intent to deceive his former client, nor

was there any evidence that Mr. Robbins would have any reason to withhold information about the case from Ms. McFadden. The only reasonable conclusion to be drawn from the substantial evidence is that Respondent's failure to disclose information to Ms. McFadden stemmed from his failure to familiarize himself with her case before he spoke with her on the phone. Such negligence is not deceit. *See In re Smith*, 749 S.W.2d 408, 413 (Mo. banc 1988) (attorney with constructive but not actual knowledge of falsity of representations not guilty of deceit).

Moreover, Mr. Robbins' testimony is not unreasonable given the number of clients Mr. Robbins represents. Mr. Robbins handles approximately 200 files in his office. T.88, 116. It is not unreasonable to conclude that Mr. Robbins, during a 2001 telephone conversation about a case he had last touched in 1997 might have been confused or mistaken. [3]

---

3 As stated in the Statement of Facts, *supra*, Mr. Robbins now reviews the client file before discussing the status of a case with a client, unless he has a specific recollection from having worked on the file very recently. T.99-100. Mr. Robbins' communication with clients has been "very good" since he adopted this new procedure. T.99-100.

Mr. Robbins testified that if he had been aware in 2001 that the McFadden case was no longer pending he would advised the client that the statute had run on the case after speaking with his carrier, The Bar Plan. T.108-109. Mr. Robbins maintains sufficient insurance coverage to indemnify his clients for any of their losses. *Robbins Affidavit* at ¶ 10.

At worst, the evidence in the Record shows Mr. Robbins negligently misrepresented the status of the McFadden claim to Ms. McFadden, by failing to realize the case wasn't viable when he spoke with her about settlement. Mr. Robbins did not violate Rule 4-8.4(c). No period of suspension is warranted.

F. The Hearing Panel's Finding That Mr. Robbins Engaged In Conduct That Is Prejudicial To The Administration Of Justice Is Not Supported By The Record.

The Hearing Panel's conclusion that Mr. Robbins engaged in conduct prejudicial to the administration of justice is also not supported by the Record.

The Information charged Mr. Robbins with violating Rule 4-8.4(d) in both the Viermann and McFadden matters. *See* Information at ¶¶16, 60. The Hearing Panel concluded Mr. Robbins engaged in conduct that was "prejudicial to the administration of justice in violation of Rule 4-8.4"

(Hearing Panel Decision at ¶ 17) but the Hearing Panel did not reference *any* factual findings to support this conclusion.

It is not apparent from the Hearing Panel Decision whether the Hearing Panel was ruling on the allegation in Count I, involving Mr. Viermann, contained in Paragraph 16 of the Information, or the allegation in Paragraph 60 of the Information regarding Ms. McFadden. *See* Hearing Panel Decision at ¶ 17. That is because the Hearing Panel Decision doesn't refer to any facts to support the conclusion that Mr. Robbins engaged in conduct that was prejudicial to the administration of justice. *See* Hearing Panel Decision at ¶ 17.

Also, there are no facts in the Record to support a Rule 4-8.4(d) violation in either the Viermann or McFadden matters. The disciplinary rule prohibiting an attorney from engaging in conduct that is prejudicial to the administration of justice "most often applies to conduct directly related to litigation, such as the interference with judicial proceedings or the abuse of process." ABA/BNA Lawyer's Manual on Professional Conduct ("LMPC"), § 101:501. "Under Rule 8.4(d), a lawyer may be found to have engaged in conduct prejudicial to the administration of justice by behaving in a manner that is uncivil, undignified, or inappropriate. LMPC at § 101:501, citing *In re Holmes,* 921 Pac.2d 44 (Colo. 1996) ("undignified, offensive, threatening and unprofessional" letters to

opponents in court employees); *In re McAlvey,* 463 A.2d 315 (N.J. 1983) (using obscenities in court)."

The evidence does not establish a Rule 4-8.4(d) violation in the Viermann or McFadden matters. Although Mr. Viermann's complaint stated that Mr. Robbins "cussed [him] out" when he asked for his wife's file and $1,000 (Ex. 7), Mr. Viermann retracted this allegation and admitted at the Hearing that Mr. Robbins "never used cuss words." T.44-46. Informant has not shown by a preponderance of the evidence that Mr. Robbins engaged in any conduct that was prejudicial to the administration of justice.[4]

The Hearing Panel's conclusion that Mr. Robbins engaged in conduct that is prejudicial to the administration of justice is not supported by reference to any facts in the Record. It is also not supported by the evidence.

---

4 Nor does the Record include evidence of a Rule 4-8.4(d) violation in the McFadden matter. No facts were introduced at the Hearing to suggest that Mr. Robbins behaved in a manner that was uncivil towards Ms. McFadden at any time.

II. THE SUPREME COURT SHOULD DETERMINE THAT JOSEPH K. ROBBINS DID NOT VIOLATE RULE 4-8.1 BECAUSE THE HEARING PANEL'S RECOMMENDATION THAT A VIOLATION BE FOUND WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The Hearing Panel also concluded that Mr. Robbins failed to respond to a lawful demand for information from him by a disciplinary hearing authority in violation of Rule 4-8.1(b). This finding of the Hearing Panel is not supported by a preponderance of the evidence.

Professional misconduct must be proven by a preponderance of the evidence. *In re Weier*, 994 S.W.2d 554, 556 (Mo. banc 1999). Charging a lawyer with professional misconduct does not create a presumption that professional misconduct occurred. *In re Mirabile*, 975 S.W.2d 936, 939, 942 (Mo. banc 1998).

A hearing panel's findings of fact, conclusions of law, and recommendations are only advisory. *In re Oberhellmann*, 873 S.W.2d 851, 852-53 (Mo. banc 1994). This Court reviews the evidence *de novo*, independently determining all issues pertaining to the credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. Rule 5.16; *In re Snyder*, 35 S.W.3d at 382; *In re Weier*, 994 S.W.2d at 556.

The Record does establish that Alan Pratzel, the hearing officer, mailed a letter to Mr. Robbins requesting information regarding Ms. McFadden's claim. Mr. Robbins did not dispute that the letter was mailed. But the fact of mailing is, at best, only circumstantial evidence that the letter was both received by Mr. Robbins' law office and received by Mr. Robbins. There is no direct evidence to support the conclusion that Mr. Robbins actually received the letter and chose to ignore it.

There is direct evidence that Mr. Robbins did not ignore Mr. Pratzel's letter. Mr. Robbins would not be able to rule out that the letter came to his office; he is not the only person on staff. T.89. However, Mr. Robbins did testify that he had no recollection of having received the letter. T.120.

Mr. Robbins normally responded to any letter request from the committee. T.103-104, 110. As a result, Mr. Pratzel was "surprised" when he didn't hear from Mr. Robbins in response to the McFadden letter. In cross-examining Mr. Robbins concerning that letter Mr. Pratzel stated:

> The letter from me that you say you didn't get, and I acknowledge that you did respond to the other complaint, so that's kind of why I think I was surprised when I didn't hear from you on this...

T.110.

Informant did not establish by a preponderance of the evidence that Mr. Robbins in fact received the McFadden letter and failed to answer it. Informant's claim is based entirely on circumstantial evidence that the letter was mailed to Mr. Robbins' law office. But Informant's evidence that the letter was sent was offset by Mr. Robbins' testimony that the letter was not received as well as the evidence that Mr. Robbins did respond to other letters from the committee.

Finally, the fact that Mr. Robbins fully responded to all inquiries made by Bar Counsel other than the letter concerning Ms. McFadden's claim certain supports Mr. Robbins' testimony that he did not receive the letter and would have responded to it if it had been received. The Hearing Panel's recommendation of a private admonition for Mr. Robbins' failure to respond to a lawful request for information from the disciplinary hearing officer in violation of Rule 4-8.1(b) should not be adopted by this Court.

III. THE SUPREME COURT SHOULD IMPOSE DISCIPLINE OF A PUBLIC REPRIMAND, AND NOT A SUSPENSION, BASED ON THE PRIOR RULINGS OF THIS COURT AND THE ABA STANDARDS.

A. THE PRIOR RULINGS OF THIS COURT SUPPORT A PUBLIC REPRIMAND HERE, RATHER THAN ANY PERIOD OF SUSPENSION.

The Informant acknowledges that mere neglect does not warrant a sanction of suspension. *See* Informant's Brief, at 14. This Court has consistently held that neglect standing alone does not merit suspension of a lawyer's license. *In re Hardge*, 713 S.W.2d 503, 505 (Mo. banc 1986; *In re Colson*, 632 S.W.2d 470, 471 (Mo. banc 1982). Informant, however, contends that suspension is called for here because allegedly "[Mr. Robbins] engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation, and that was prejudicial to the administration of justice." Informant's Brief, at pg. 20.

As demonstrated *supra*, however, there is no substantial evidence in the record to support Informant's claim (or the Panel's conclusion) that Mr. Robbins *deliberately or intentionally* misled anyone. At worst, the evidence shows Mr. Robbins was only negligent in communications with his clients, which is insufficient to support a finding of deceit. *In re*

Smith, 749 S.W.2d 408, 413 (Mo. banc 1988) (constructive knowledge of falsity of statements insufficient to find deceit).

But even if all of the Hearing Panel findings were correct, suspension would still not be warranted. This Court has affirmatively *declined* to impose suspension on analogous but more egregious facts than those alleged here. *In re Staab*, 719 S.W.2d 780 (Mo. banc 1986).

In *Staab*, the respondent was found to have seriously neglected matters for two separate clients, resulting in the dismissal of their respective claims. In both instances the respondent had directly, affirmatively and repeatedly misrepresented to the clients that their claims were still pending and viable. Moreover, unlike (and comparatively more detrimental than) this case, Staab had demonstrated a lengthy and extensive pattern of non-cooperation with disciplinary investigations. The master had recommended suspension for 60 days. This Court, while accepting the master's findings of professional misconduct, nevertheless ***rejected*** the master's recommended discipline, imposing a reprimand instead.

Pertinent to the Informant's reliance in this case on Mr. Robbins' alleged ***but unproven*** dishonesty, this Court in *Staab*, expressly considered Staab's admitted lack of "honesty and forthrightness" as "weigh[ing] in the balance which determines the proper penalty to be

assessed against respondent." *Staab,* 719 S.W.2d, at 781, *n.* 2. Even weighing the more egregious misconduct of Staab, this Court nevertheless concluded that suspension was not warranted. Suspension is also not warranted here, on materially less culpable facts.

In this case, the Hearing Panel recommended a minimum one-month suspension for each of the neglected client matters. The Informant here seeks a much harsher penalty of indefinite suspension without leave to apply for reinstatement for six months. Neither recommendation is justified by the Record or by this Court's precedents.

In the case of *In re Gray*, 813 S.W.2d 309 (Mo. banc 1991), this Court reprimanded the attorney for his neglect of a client's divorce case that resulted in dismissal. The attorney was found to have repeatedly lied to his client about the status of the case and had submitted falsely executed and notarized documents with the court. Undoubtedly, falsifying evidence submitted to a tribunal is more serious than the conduct proven in this case, and the sanction here should not be harsher.

Similarly, in *In re Weier*, 994 S.W.2d 554 (Mo. banc 1999), a reprimand was deemed a sufficient sanction, although the attorney had culpably misrepresented his relationships with various business entities

resulting in the concealment of his potentially conflicting financial interests.

This Court issued a reprimand over the Bar Committee's recommendation of disbarment in *In re Hardge*, 713 S.W.2d 503 (Mo. banc 1986). There, the attorney had accepted the client's bankruptcy case although she was not admitted to the Bankruptcy Court, had failed to prosecute the matter resulting in an unnecessary continuation of garnishment of the client's wages, and had failed to refund the client's retainer for a period of four months.

This Court found that a prior letter of admonition did not call for sanction beyond a reprimand in *In re Kopf*, 767 S.W.2d 20 (Mo. banc 1989), where the attorney failed to act on the client's matter and failed to communicate with the client for over two-and-one-half years.

This Court's unpublished disciplinary decisions also support the sufficiency of a reprimand in this case. One case in particular bears special note, *In re Kramer*, No. SC82516 (October 3, 2000).

In *Kramer*, the attorney received a public reprimand for admitted conduct that was far more egregious than anything alleged here. Kramer admittedly failed to pursue numerous client matters and then knowingly and deliberately misrepresented the status of the cases to her clients, even going so far in one instance as to tell a client that a case had been

settled when it had not. Also, Kramer received a public reprimand, rather than any harsher punishment such as a suspension, despite a prior history of discipline consisting of two prior letters of admonition for similar conduct.

Obviously, this Court can take judicial notice of its own records, including the proceeding as well as its rulings in non-published cases. The *Kramer* file includes a stipulation filed April 11, 2000 ("Kramer Stipulation") entered into by counsel for Informant and counsel for Kramer whereby Kramer stipulated, *inter alia*, to the following facts:

- [Kramer] represented Tracy Recke ("Recke") in a personal injury action arising out of an automobile accident occurring in December 1992. During the course of that legal representation ....[Kramer] represented to Recke that the judge involved in the case wanted the matter settled out of court and that [Kramer] and the insurance carrier were in negotiations to settle the case. *See* Kramer Stipulation at ¶ 24.
- In February, 1988, [Kramer] represented to Recke that the insurance carrier had agreed to settle Recke's personal injury claims for a total settlement of $390,000. *See* Kramer Stipulation at ¶ 25.

- Recke contacted [Kramer] on numerous occasions to inquire as to the status of the settlement. *[Kramer] provided Recke with excuses in an effort to explain the delay in concluding the "settlement". [sic] Recke ultimately learned from the insurance company that no settlement had been reached in her claim. See* Kramer Stipulation at ¶ 26 *(emphasis added).*
- [Kramer] was retained to represent Waneta Link ("Link") in her claim for personal injury arising out of an automobile accident. *See* Kramer Stipulation at ¶ 28. [After obtaining a default judgment, Kramer] agreed to pursue collection of the default judgment on behalf of Link. [Kramer] told Link that she had retained the services of a Virginia attorney to enforce the judgment in Virginia. Subsequently, [Kramer] told Link that she had also retained the services of a judge in Virginia to assist in enforcing the default judgment. *In fact, [Kramer] had retained neither a lawyer nor a judge to purse the collection of the default judgment. See* Kramer Stipulation at ¶ 29 *(emphasis added).*
- [Kramer] also represented to Link ....that the Virginia Attorney General had collected the proceeds from the judgment and that [the]proceeds were available to Link at Respondent's office. *In fact, the Attorney General was not involved with the collection efforts on*

[the] judgment and no proceeds from the judgment were available to Link." *See* Kramer Stipulation at ¶ 30 (emphasis added).

- [Kramer] was retained by Norman Leach ("Leach") to represent him in a personal injury action arising out of an automobile accident occurring in 1988. *See* Kramer Stipulation at ¶ 33.
- [Kramer] filed a lawsuit on behalf of Leach in the St. Louis City Circuit Court. The Court dismissed the lawsuit on May 6, 1994 for failure to prosecute. *Leach periodically contacted Respondent to inquire about the status of the lawsuit after that date and Respondent represented to him that his lawsuit was either still pending and would soon be coming up on the trial docket or that the case was "riding the docket."* .... By the time Leach discovered that the case had been dismissed the statute of limitation had run on his claim." *See* Kramer Stipulation at ¶ 34 *(emphasis added).*

On October 3, 2000, this Court entered an order finding Kramer was "guilty of professional misconduct for violation of Rules 4-1.3, 4-1.4-3.4 and 4-8.4(c). This Court also ordered "that [Kramer] be, and...is hereby publicly reprimanded."

In *Kramer* this Court determined that a public reprimand adequately protected the public. This Court reached that conclusion in the *Kramer* case even though the evidence introduced at the hearing

showed the attorney was actively undergoing regular treatment with a psychoanalyst for serious psychiatric problems that she experienced in the past. *See* Transcript of January 6, 2000 Kramer Hearing.

The admitted conduct in Kramer is far more extensive and egregious than anything alleged or proven here. Mr. Robbins has readily and candidly acknowledged that he neglected two client matters, but there is no substantial evidence (as was stipulated in *Kramer*) that he knowingly misled any clients. Moreover, Informant does not even claim here that Mr. Robbins engaged in any affirmative misrepresentations but only misrepresentations by omission. Also, pertinent to this case, Kramer was only reprimanded although she had two prior letters of admonition. Finally, with Mr. Robbins, there is no suggestion here that Mr. Robbins is not mentally or physically capable of abiding by the Rules of Professional Responsibility.

Other non-published decisions of this Court also rebut Informant's claim that a suspension should be imposed here:

1. *In re Meyers*, No. SC78320 (December 17, 1996). Attorney neglected matters for five separate clients, made false statements to two of the clients regarding the status of their cases and failed to cooperate with disciplinary inquiries in numerous instances. No suspension was imposed.

2. *In re Walton*, No. SC83341 (May 15, 2001). Attorney committed multiple and serious violations involving poor supervision of office personnel, false statements to a tribunal, and inattention to client matters. The Attorney had received two prior letters of admonition. No suspension was imposed.

3. *In re Franco*, No. SC83356 (May 29, 2001). Attorney failed to competently and diligently represent and inform client in a deed modification matter, he misrepresented his ability to represent a criminal defendant in Kansas where he was not licensed, he lied to Kansas judicial officials that he was admitted to practice in Kansas, and he failed to cooperate in disciplinary inquiries. A 90-day suspension was recommended, but this Court determined that a reprimand was sufficient.

4. *In re Browning*, No. SC77501 (January 23, 1996). Attorney failed to open a probate estate for client, erroneously advised client she could sell real property of the estate, and lied to client about having opened the probate estate. This Court determined that a reprimand was sufficient, although the special master recommended suspension.

5. *In re Ruddy*, No. SC80131, (August 19, 1977). Attorney failed to obtain subpoenas for trial witnesses, lied to client about

the failure, and failed to keep client informed about the case. No suspension was imposed.

6. *In re Walker,* No. SC80578 (May 26, 1998). Attorney failed to file SSI appeal, resulting in dismissal for lack of prosecution, and falsely told client that appeal had been filed well after it had been dismissed. No suspension was imposed.

7. *In re Tobin*, No. SC84091 (January 2, 2002). Attorney was suspended from practice in Illinois for failing to tell client about his violation of court order that resulted in the striking of client's defense. The concealment led to client's settling the case unfavorably. This Court determined that a reprimand was sufficient sanction, and no suspension was imposed.

8. *In re Moore-Dyson*, No. SC81282 (April 27, 1999). Attorney found guilty of neglect, inattention, failure to communicate with and failure to respond to four different clients, and failed to refund a retainer to a client. No suspension was imposed.

Moreover, none of the cases Informant relies upon to support its demand for a suspension are analogous to the facts and circumstances in this case.

In re Lavin, 788 S.W.2d 282 (Mo. banc 1990), is inapposite because, there, it was shown the attorney had kept *throughout the disciplinary process* some $1,450 in unearned fees. Further, this Court noted that respondent's alcoholism was "partially responsible for his inaction on the case." *Lavin*, 788 S.W.2d, at 284. This Court's sanction of suspension was directly tied to these two factors – neither of which is present in this case. There is no issue of alcoholism here, and Mr. Robbins returned Mr. Viermann's expense deposit without delay. T.54-55, 34-35, 40-41. This Court specifically conditioned Lavin's reinstatement on monetary restitution to the client and a showing of participation in a treatment program for his alcoholism. Given that the principal purpose of discipline is to protect the public, *Lavin*, 788 S.W. 2d, at 285, suspension was appropriate in that case to gain some assurance that the attorney's alcoholism would no longer "interfere with his practice of law." *Id*., at 284. Here, Mr. Robbins testified at length about the remedial measure he implemented even before the disciplinary hearing. T.99-140. Thus, there is no analogous reason for imposing suspension in this case.

Informant's reliance on *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994), is wholly misplaced. There, the attorney was guilty of "thirty-nine ethical violations in the representation of eleven clients demonstrat[ing] a

disturbing, continuing disregard for the rights and interests of his clients." *Frank*, 885 S.W.2d, at 334. This Court also found that there were ***no factors*** in that case that would mitigate the sanction. *Frank*, 885 S.W.2d, at 333. Moreover, the attorney in *Frank* was found to have engaged "in bad faith obstruction of disciplinary proceedings. . . [and had] refused to acknowledge the wrongful nature of his conduct." *Id*. In this case, there is no evidence of *intentional* disregard of disciplinary proceedings, much less bad faith obstruction, T.103-104, and Mr. Robbins herein has candidly acknowledged his mistakes and taken steps to assure they are not repeated. T.93, 96, 107.

In re Cupples, 979 S.W.2d 932 (Mo. banc 1998), *In re Disney*, 922 S.W.2d 12 (Mo. banc 1996), and *In re Ver Dught*, 825 S.W.2d 847 (Mo. banc 1992), are not even remotely analogous the this case. Informant's own descriptions of these cases is sufficient to demonstrate their inapplicability. Before discussing the three cases, however, it should be noted that Informant cites these cases only for the proposition that "Dishonest and deceitful conduct resulted in suspensions for lawyers." Informant's Brief, at 20. Again, Informant has wholly failed to prove that Mr. Robbins engaged in any *knowing or intentional* misrepresentation, much less the kinds of egregious misconduct found in *Cupples*, *Disney*, and *Ver Dught.*

In *Cupples*, the attorney was found to have defrauded his law firm by maintaining a secret, competitive side practice – *while using firm assets*. Thus, in addition to the deliberate, intentional deceit, his conduct also amounted to *theft* from his firm. Moreover, this Court found that Cupples' conduct exposed his firm to potential malpractice liability. Finally, and markedly *unlike this case*, Cupples already had been publicly reprimanded by this Court for almost identical misconduct with respect to another law firm by which he had been previously employed. *See Cupples*, 979 S.W.2d, at 932; *Matter of Cupples*, 952 S.W.2d 226 (Mo. banc 1997).

Disney is similarly wide of the mark. In that case, the attorney was found guilty of dishonesty by subterfuge in setting up a sham trust to shield assets from a judgment creditor (his ex-wife), and in breaching (in numerous significant particulars) a contract he had with a client. There is simply no evidence of such egregious conduct in this case.

Finally, *Ver Dught* is patently inapplicable to this case because the attorney there was found guilty of suborning perjury and knowingly submitting false and misleading evidence to a tribunal.

B. THE ABA STANDARDS FOR IMPOSING LAWYER DISCIPLINE SUPPORT A PUBLIC REPRIMAND RATHER THAN ANY PERIOD OF SUSPENSION.

The applicable ABA standards for imposing lawyer discipline support a public reprimand rather than any period of suspension.

This court has relied on the American Bar Association standards for imposing discipline in determining appropriate sanctions. *See* ABA Standards for Imposing Lawyer Sanctions (1991) (hereinafter "ABA Standards"). The following standards are relevant to the allegations here:

> 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.
>
> 4.53 Reprimand is generally appropriate when a lawyer:
>
> (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
>
> (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other [non criminal] conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.5

8.3 Reprimand is generally appropriate when a lawyer:

(b) has received an admonition for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

The applicable ABA standards for imposing lawyer discipline support a public reprimand rather than any period of suspension.

---

5 Again, Mr. Robbins does not accept Informant's claim that a Rule 4-8.4 violation occurred here, but this standard is cited for the court's reference only.

IV. THE SUPREME COURT SHOULD IMPOSE DISCIPLINE OF A PUBLIC REPRIMAND, AND NOT A SUSPENSION, BECAUSE OF THE EXISTENCE OF NUMEROUS MITIGATING FACTORS, INCLUDING MR. ROBBINS' ACCEPTANCE OF RESPONSIBILITY, HIS AFFIRMATIVE ACTIONS TAKEN TO AVOID A REOCCURRENCE, AND HIS GOOD REPUTATION FOR HONESTY AND COMPETENCE.

The fundamental purpose of an attorney disciplinary proceeding is to "protect the public and maintain the integrity of the legal profession." *In re Waldron*, 790 S.W.2d 456, 457 (Mo. banc 1990). It is proper to consider mitigating factors when determining the appropriate discipline. *See In re Harris*, 890 S.W.2d 299, 302 (Mo. banc 1994); *Snyder*, 35 S.W.3d at 384.

Many of the mitigating factors recognized by this Court are present here.

The Court recognizes that a lawyer's acceptance of responsibility and remorse for his misconduct are mitigating factors, as are cooperation with the disciplinary authorities and the lawyer's honest commitment not to violate the Rules of Professional Conduct in the future. *In re McBride*, 938 S.W.2d 905, 908 (Mo. banc 1997) (imposing public reprimand despite felony conviction where lawyer was truly remorseful for his

misconduct); *In re Coe*, 903 S.W.2d 916, 918 (Mo. banc 1995) (reducing discipline to public reprimand from suspension when, following initial determination of discipline, attorney made public apology and promised not to commit similar misconduct in the future).

Here, Mr. Robbins throughout his testimony to the Hearing Panel, as well as in his affidavit filed in this Court, acknowledges his neglect and has accepted responsibility for it. He cooperated fully in the Bar's investigation, the one unreceived and unanswered letter notwithstanding. Moreover, in contrast to the last-minute apology and promise by the respondent in *In re Coe*, Mr. Robbins adopted new procedures to ensure that he would not neglect his clients in the future *prior* to his hearing before the Hearing Panel. These procedures, which were discussed in detail previously, included the adoption of new methods of recording statutes of limitations, frequent periodic reviews of all files being handled by his office, and the review of files before communicating with clients. It is commonly said that "actions speak louder than words." Here, Mr. Robbins has taken the actions necessary to make his promise of greater care in the future a reality and not just empty words.

The Court recognizes that a lawyer's good reputation in the community and at the Bar is a mitigating factor. *In re Weier*, 994 S.W.2d

554, 558 (Mo. banc 1999); *In re McBride*, 938 S.W.2d 905, 908 (Mo. banc 1997).

Mr. Robbins has submitted to the Court as attachments to his affidavit letters from judges, a leading lawyer, and persons in the community, attesting to his honesty and his good reputation for integrity, competence and diligence. The letter writers include a judge of the Missouri Court of Appeals, the Hon. Mary Hoff. A second writer, Eugene Buckley, is highly regarded in the St. Louis legal community as both a highly capable as well as a highly ethical attorney. The fact that such highly regarded judges and lawyers speak well of Mr. Robbins and his reputation for integrity is a mitigating factor which should be considered favorably by the Court.

Similarly, a lawyer's contributions to the Bar and to the community can be mitigating factors. *In re Carey*, 89 S.W.3d 477 (Mo. banc 2002); *In re Caranchini*, 956 S.W.2d 910, 919 (Mo. banc 1997). Here, the evidence shows that Mr. Robbins has for many years made contributions both to the Bar and to the community in general. His contribution to the Bar includes service to the courthouse library association; service on both Missouri Bar and BAMSL committees, including service on the BASML fee dispute committee; writing articles for Bar publications; and teaching in seminars. His contribution to the community ranges from

service to his neighborhood association, his church and parish school, and the YMCA. He has devoted many hours over the years to these activities, which include serving on the governing boards, assisting in fundraising, and providing *pro bono* legal services.

The Court also recognizes as a mitigating factor those instances where a lawyer's neglect does not reflect adversely on the lawyer's honesty. *In re McBride*, 938 S.W.2d at 908. Here, the evidence establishes Mr. Robbins is guilty only of honest neglect and not dishonesty. Although he made statements to Ms. McFadden which were not accurate, he gave a reasonable explanation that his inaccurate statements resulted from inattention and carelessness in "shooting from the hip" in a telephone conversation with Ms. McFadden without first reviewing the file. Negligent? Yes. Dishonest? No.

The Court should recognize as a mitigating factor the fact that a lawyer is the primary or main source of financial support for his family. The Court recognizes that the lawyer had no personal gain from his failure to conform to the Rules of Professional Conduct can also be a mitigating factor. *In re Harris*, 890 S.W.2d at 302. Here, Mr. Robbins is the primary financial support for his wife and two minor children. Furthermore, there is no evidence or reasons to believe that he gained financially in any way at all by neglecting the cases of these two clients.

To the contrary, at least with respect to Ms. McFadden's case, Mr. Robbins expected to gain financially by prosecuting the case (he has no recollection of the merits of Mr. Viermann's case). *See* T. 93-99, 105-06.

Given the negligent and non-intentional nature of Mr. Robbins' violation, and given all of the mitigating factors present in this case, suspension is not appropriate.

V. IF ANY SUSPENSION IS ORDERED, THEN ENFORCEMENT SHOULD BE STAYED WHILE MR. ROBBINS IS PLACED ON PROBATION PURSUANT TO RULE 5.225 BECAUSE MR. ROBBINS IS NOT A DANGER TO THE PUBLIC, CAN CONTINUE TO PRACTICE LAW WITHOUT PLACING THE COURTS IN DISRESPECT, AND HAS NOT COMMITTED AN OFFENSE WARRANTING DISBARMENT.

Rule 5.225, effective January 1, 2003, provides that a "lawyer is eligible for probation" if he or she:

(1) Is unlikely to harm the public during the period of probation and can be adequately supervised;

(2) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and,

(3) Has not committed acts warranting disbarment.

Probation under Rule 5.225 is "imposed for a specified period of time in conjunction with a suspension" and "the suspension may be stayed in whole or in part." Rule 5.225.

Rule 5.225 also provides that "[a]ny order placing a lawyer on probation shall specify the conditions of probation. The conditions shall take into consideration the nature and circumstances of the lawyer's

misconduct and the history, character, and health status of the lawyer." Rule 5.225.

Mr. Robbins contends that no period of suspension is warranted based on the above arguments.

If this Court does impose any period of suspension, then this Court should not enforce the suspension at this time and instead place Mr. Robbins on probation.

Mr. Robbins clearly qualifies for probation under Rule 5.225. Mr. Robbins is not likely to harm the public during the period of probation and he can be adequately supervised. Rule 5.225(1). Mr. Robbins "[i]s able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute." Rule 5.225(2). Finally, even the Informant concedes that Mr. Robbins "[h]as not committed acts warranting disbarment." Rule 5.225(3).

Probation, if the Court deems suspension appropriate, would also prevent likely harm to innocent third parties other than Mr. Robbins. Mr. Robbins, his family, including his two minor children, rely on Mr. Robbins' to provide all of life's necessities as suspension would obviously dramatically reduce his income. Also, it is appropriate for this Court to consider the impact that any suspension could have on Mr. Robbins' firm and his existing clients. Mr. Robbins operates "The Robbins Law Firm,"

a small law firm consisting currently of Mr. Robbins and one associate. Any enforced suspension of Mr. Robbins would not only impact Mr. Robbins' income and his associate's income, but also, the well being of Mr. Robbins' existing clients.

CONCLUSION

The Hearing Panel's recommendation of a suspension was based on factors that are not supported by the Record. Although Mr. Robbins was careless in his responses to client matters and in response to client inquiries, he never willfully or intentionally misled any client regarding the status of any matter.

It is well established that the fundamental purpose of attorney discipline proceeding is designed "to protect the public and maintain the integrity of the legal profession." *In re Weier*, 994 S.W.2d 554, 558 (Mo. Banc 1999). Discipline is not to punish the offender. *In re Coe*, 903 S.W.2d 916, 918 (Mo. banc 1995). Mr. Robbins respectfully submits that a suspension here would be simply punitive in nature and not consistent with the purpose of attorney discipline. Under the totality of the circumstances of this case, including the mitigating factors, the proper discipline to be imposed on

Respondent is, at most, a public reprimand without suspension of his law license.

Respectfully submitted,

ROSENBLUM, GOLDENHERSH, SILVERSTEIN & ZAFFT, P.C.

By: _____

Edward J. Rolwes #51522
Michael D. Quinlan #35314
7733 Forsyth Blvd., Suite 400
Clayton, MO 63105
Tel: (314) 726-6868

GREEN SCHAAF & JACOBSON, P.C.

By: _____

Martin M. Green #16465
Jo D. Jacobson #33715
7733 Forsyth Blvd., Suite 700
Clayton, MO 63105
Tel: (314) 862-6800

CERTIFICATE OF SERVICE

I hereby certify that two copies of Respondent's Brief, and a duplicate floppy disk, have been served on Sharon K. Weedin, Office of Chief Disciplinary Counsel, 3335 American Avenue, Jefferson City, MO 65109, by First Class mail, postage prepaid, this 23rd day of January, 2003.

_____

Edward J. Rolwes

CERTIFICATION: SPECIAL RULE NO. 1(c)

I further certify, the best of my knowledge, information and belief:

1. that this brief includes the information required by Rule 55.03;

2. that this brief complies with the limitations contained in Special Rule No.1(b);

3. that this brief contains 13,692 words excluding the cover and signature block, according to Microsoft Word, which is the word processing system used to prepare this brief;

4. that the attached disk includes electronic copies of the brief, in Microsoft Word for Windows format; and that both the disk and the files have been scanned for viruses with McAfee Anti-Virus software and are virus-free.

_____

Edward J. Rolwes